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978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbiggin

Excerpt

[More information](#)

## Introduction: Hindu law, family and Indian democracy

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This book traces the turbulent history of a single legislative project to bring new insight to our understanding of the emergence of democratic citizenship in India. It examines the origins and development of the Hindu Code Bill, a measure that sought to reform and codify Hindu personal law, that is the system of family law to which Indian Hindus, Sikhs, Buddhists and Jains are understood to adhere.<sup>1</sup> The conventional narrative about the Hindu Code Bill is that work on the Code began in the final years of British rule, following the Government of India's appointment of a committee of Hindu legal experts to look into and report on the state of Hindu family law in January 1941. But the Code was not passed by the Indian legislature until the mid 1950s. Most of the studies that have looked at the Code Bill so far have understood it as a 'women's Bill', drawn up to 'modernise' Hindu law by breaking with the patriarchal structures of colonial law in order to improve Hindu women's legal rights within the family.<sup>2</sup> At the hands of the Indian legislature, however, the modernisation project was arrogated by male representatives who considered other concerns, including economic

<sup>1</sup> The Code Bill legislation was drawn up to apply to 'all persons professing the Hindu religion in any of its forms or developments ... to persons professing the Buddhist, Jaina or Sikh religion' and on the presumption that 'until the contrary is proved, that the whole of this Code applies to any person who is not a Muslim, Christian, Parsi or Jew by religion', but quite who is governed by Hindu law was and remains a controversial question. M. Galanter, 'Hinduism, secularism and the Indian judiciary', *Philosophy East and West*, 21, 4 (October, 1971), pp. 467–487; F. Agnes, *Law and gender inequality: the politics of women's rights in India* (New Delhi, 1999), pp. 22–26.

<sup>2</sup> J. M. Everett, *Women and social change in India* (Delhi, 1981); L. Sarkar, 'Jawaharlal Nehru and the Hindu Code Bill', in B. R. Nanda (ed.), *Indian women* (New Delhi, 1976), pp. 87–98; A. Parashar, *Women and family law reform in India* (Delhi, 1992); R. Kumar, *The history of doing* (Delhi, 1993), pp. 97–99; R. Som, 'Jawaharlal Nehru and the Hindu Code Bill', *Modern Asian Studies*, 28, 1 (1994), pp. 165–195; G. Forbes, *Women in modern India* (Cambridge, 1996), pp. 112–119; P. Pardeshi, 'The Hindu Code Bill for the liberation of women', in A. Rao (ed.), *Gender and caste* (New Delhi, 2003), pp. 346–362; C. Sinha, 'Hindu Code Bill (1941–56) and feminist consciousness in Bombay', Unpublished PhD thesis, University of Mumbai, 2004; C. Sinha, 'Images of motherhood: the Hindu Code Bill discourse', *EPW*, 42, 43 (27 October–2 November 2007), pp. 49–57.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## 2 Introduction

development, national integration and preservation of religious community, as more important for the emergence of modern India than women's rights.<sup>3</sup> As such, the final outcome of the Code Bill project has been seen as a limited step towards gender equality at best and as evidence of the state's lack of commitment to women's rights and the democratic principles of social equality at worst.

This book offers a different account of the Code Bill and its modernising drive. Tracing its origins back to the economic pressures of the First World War, it argues that the most powerful set of interests driving the Code was concerned not with gender equality but with a desire to rationalise the Hindu family as an economic unit. This is not simply to claim that economic interests 'trumped' gender equality in the formation of Indian democracy; rather it is an argument that we must see democracy differently – as a mode of government that comprises not a political rights regime *and* particular economic formations but one which operates through structures that are simultaneously grounded in both. This book sees the Code Bill project as part of the broader shifts in the framework of state governance in India that were triggered by the First World War. The devolution of power to Indians in this period destabilised existing understandings of the relationship between Indian society and state power and therefore also of the frameworks through which this relationship was seen to operate, frameworks structured around notions of the economy, citizenship and secularism. This book shows how gender relations – not simply women's rights but the relationship between men and women, and different groups of men and thus also the family, as the key site of such relations – were integral to the constitution of all of these different aspects of the state–society framework.

Seeking to establish a clear model of Hindu family relations, the Code Bill project played a critical role in resolving the ruptures opened up by devolution, establishing a legal definition of the family that helped to constitute, but was also constituted by, the framework of economy, citizenship and secularism emerging at this point. To see the Code Bill only as a 'women's Bill' is to miss its wider significance for postcolonial governance in India. The Code Bill was not a vehicle for a struggle between economic and political conceptions of citizenship, or between state and social 'interests' that existed *prior to* the Code; it was through

<sup>3</sup> L. Sarkar, 'Jawaharlal Nehru and the Hindu Code Bill', in B. R. Nanda (ed.), *Indian women* (New Delhi, 1976), pp. 87–98; G. Forbes, *Women in modern India* (Cambridge, 1996), pp. 115–119; for a detailed description of the various factors pitted against the Code Bill see R. Som, 'Jawaharlal Nehru and the Hindu Code Bill: a victory of symbol over substance', pp. 172–173.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## Introduction

3

the passage of the Code Bill legislation that state power and its relationship to Indian 'society', 'citizens' and the 'economy' came to be defined. Tracing the history of the Code Bill from this perspective, this book brings new insight to our understanding of India's transition from colony to liberal democracy, as well as to our understanding of gender in relation to this process.

This discussion of democratisation focuses not on an abstract or universal form of government but on the particular configuration of representative government that emerged in India during the first half of the twentieth century. Making direct election the basis of all levels of government, from the local boards to the national legislatures, the 1919 Government of India Act was a 'watershed in the evolution of representative politics' in India.<sup>4</sup> But key aspects of these reforms, most notably the structure of Indian electorates under the Act, were heavily shaped by developments in the three decades that preceded the First World War. Since the late nineteenth century, the colonial administration had faced mounting pressure from elite Indians who demanded a greater share of political power. For British officials, a central question arising from this demand was to whom to devolve power. From the outset of British rule, India had been seen as comprising not a society of individuals but a collection of different communities, bound first and foremost by religious identity.<sup>5</sup> It was argued that such a framework was ill suited to the model of electoral politics used in the metropole and, by this time, in many other British colonies, which was based on the principle of one person, one vote.<sup>6</sup> The 1892 Indian Councils Act opened up a minority of seats in the provincial councils and Indian legislature to Indian representatives who were selected only on an indirect basis, through official government nomination or on the recommendation of certain bodies rather than individual voters. The 1909 Government of India Act took this process further. A number of nominated official and unofficial representatives, at both the provincial and all-India levels of government, were retained, but a new category of elected representatives was added to these councils and legislatures. Significantly, the Act made specific

<sup>4</sup> J. Chiriyankandath, "'Democracy" under the Raj', in N. G. Jayal (ed.), *Democracy in India* (New Delhi, 2001), p. 59.

<sup>5</sup> C. A. Bayly, *Indian society and the making of the British Empire* (Cambridge, 1988), especially Chapter 1; T. Metcalf, *Ideologies of the Raj* (Cambridge, 1994); G. Prakash, 'The colonial genealogy of society', in P. Joyce (ed.), *The social question* (London, 2002), pp. 81–96; R. Travers, *Ideology and empire in eighteenth-century India* (Cambridge, 2007).

<sup>6</sup> P. Knaplund, 'Great Britain and the British Empire', in F. H. Hinsley (ed.), *Material progress and world-wide problems 1870–1898* (Cambridge, 1962), pp. 383–410; S. Tejani, *Indian secularism* (Bloomington, Ind., 2008), Chapter 3.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## 4 Introduction

identities, as well as narrow property qualifications, the basis of this new franchise, establishing electorates for Muslims and landlords as well as a 'general' electorate.<sup>7</sup> The 1919 Government of India Act dramatically expanded the number of elected seats in the provincial and all-India legislatures, as well as the number of people who could vote for these representatives (though this remained an extremely small section of the general populace, with just below 3 per cent of Indians eligible to vote at the provincial level and an even smaller number entitled to elect central representatives). The system of separate electorates was retained under the 1935 Government of India Act, which expanded the franchise so that around one fifth of the adult population could vote, an arrangement which remained in place until the withdrawal of British power in 1947.<sup>8</sup>

The interwar reforms fall far short of the universal franchise that we consider the hallmark of democracy today and which was introduced to India only after independence in 1950. Even so, in drawing Indian representatives into a state structure that from the beginning of colonial rule had acted on but existed outside Indian social relations, these changes fundamentally transformed the relationship between state power and society in India. In looking at this period, scholars have focused particularly on how devolution reshaped and politicised the notions of religious identity that had been integral to the structures of colonial rule from its outset.<sup>9</sup> The East India Company established its authority over all temporal matters, but, as a marker of the Company State's enlightened tolerance, Warren Hastings, the first Governor General of India, set out a Plan for the Administration of Justice which established that 'in all suits regarding inheritance, marriage, caste, and other religious usages, or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to the Gentoos [Hindus], shall be invariably adhered to'.<sup>10</sup> This ruling established Indian religions as synonymous with, and primarily constituted through, the regulation of family relationships. Determined not by a state legislature but according to the religious, caste, gender and regional identity of a subject, these

<sup>7</sup> Tejani, *Indian secularism* (Bloomington, Ind., 2008), Chapter 3; Chiriyankandath, "'Democracy" under the Raj', p. 58.

<sup>8</sup> Chiriyankandath, "'Democracy" under the Raj', pp. 59–78.

<sup>9</sup> See, for example, S. Freitag, *Collective action and community: public arenas and the emergence of communalism in north India* (Berkeley, Calif., 1989); M. Hasan, *Nationalism and communal politics in India, 1885–1930* (New Delhi, 1991); G. Pandey, *The construction of communalism in colonial north India* (New Delhi, 1992); W. Gould, *Hindu nationalism and the language of politics in late colonial India* (Cambridge, 2004); Tejani, *Indian secularism*.

<sup>10</sup> Cited in W. H. Morley, *The administration of justice in British India* (London, 1858), p. 178.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbiggin

Excerpt

[More information](#)

rules were called personal laws because they were thought to rest in the body of the person, not the state. At the same time, administered by colonial courts, these laws were not independent of the political authority of the state. 'Religion', in this legal form, was managed by the colonial state through processes that separated it from the purportedly non-religious field of state political power. Devolution was a shift, then, because it granted political authority to representatives of peoples who were defined exclusively in terms of religious identity.

### Devolution and the modern Indian state

Different scholarly understandings of the colonial project in general, and specifically of the relationship between colonial authority and the Indians it governed *before* the interwar years, have produced different understandings of the process of devolution and its legacy for Indian history. Comparisons between the colonial state and its European equivalent have given rise to a view of the former as a distortion of the liberal ideal, promising rights and change on the one hand, while on the other hand either restraining Indian society within novel and rigid socio-religious categories or simply adopting a policy of benign neglect.<sup>11</sup> From this perspective, the interwar years can be seen as a moment when powerful Indian social groups, frustrated at the way in which they had been held back by colonialism, wrested control of this warped state structure for themselves. While these groups drew on the liberal language of nationhood and rights to challenge the state, their own power was limited by conditions not entirely dissimilar to those faced by the colonial administration: a concern about the social unrest that raising taxation could produce and a sense that their power rested on preserving, rather than undoing, the illiberal social structures through which the state acted. The interwar period, then, saw the nationalising of a very particular kind of colonial state structure.<sup>12</sup> The postcolonial state today can be seen as a continuation of this mode of governance, promising social reform but lacking the strong social base to enact its reformist policies

<sup>11</sup> B. Cohn, 'From Indian status to British contract', *The Journal of Economic History*, 21, 4 (December, 1961), pp. 613–628; D. Washbrook, 'Law, state and agrarian society', *Modern Asian Studies*, 15, 3 (1981), pp. 649–721; R. O'Hanlon, 'Issues of widowhood', in D. Haynes and G. Prakash (eds.), *Contesting power* (New Delhi, 1991), pp. 62–108; R. Guha, *Dominance without hegemony: history and power in colonial India* (Cambridge, Mass., 1997).

<sup>12</sup> C. J. Baker, *An Indian rural economy* (Oxford, 1964), Chapter 6; D. Washbrook, 'Law, state and agrarian society'; R. Guha, *Dominance without hegemony: history and power in colonial India*.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## 6 Introduction

on the ground. This is an argument I have made in an earlier working out of the history of the Code Bill but from which this book departs.<sup>13</sup>

This view of the colonial state has been critiqued by scholars who have highlighted the way in which many Indians responded to colonialism not by embracing the liberal ideals in which colonial power was framed but by developing their own arguments about Indian identity and its foundation that fundamentally challenged universalist liberal claims.<sup>14</sup> In an essay that has become part of the foundational framework for understanding modern South Asian history, Partha Chatterjee has argued that the late nineteenth century brought about a shift in the location of the elite nationalist project from the political to the religious space of the family. He sees the move in elite Bengali discourse away from discussions about the improvement of women's place in Indian society in this period as evidence of a turning away from liberalism, rather than from women's interests as such. Feeling increasingly marginalised in the political realm, Bengali elites came to regard the family and domestic space as a site of religious purity and indigenous strength and, as such, the proper place for the foundation of a new nation. Women's education remained a key preoccupation of the nationalist elite, but was now defined in terms of practices that would strengthen and defend the religious domestic space in which a distinctly Indian nation was to be developed rather than in the supposedly 'universal' terms of western conceptions of social progress.<sup>15</sup> At the end of this essay, Chatterjee speculates about the impact of independence on this inherently Hindu nation-building process. Referring to the political debates about state intervention in Muslim personal law that were raging at the time he wrote the essay, Chatterjee likens the position of contemporary Indian Muslim opponents of reform to that of the nineteenth-century Bengali elites he discusses.<sup>16</sup> Without commenting on the complexities of interwar devolution, Chatterjee sees the post-colonial Indian state as rising out of and operating through the framework of this Hindu conception of the nation.

Feminist scholarship has provided a critical intervention in these discussions by drawing attention to the ways in which colonial rule marginalised women, not simply by making them subjects of domination in the religious sphere but through the framework of liberal subjecthood that

<sup>13</sup> E. Newbigin, 'A post-colonial patriarchy?', *Modern Asian Studies*, 44, 1 (2010), pp. 121–144; see also S. Kaviraj, 'On state, society and discourse in India', in J. Manor (ed.), *Rethinking third world politics* (London, 1991), pp. 72–99.

<sup>14</sup> See especially P. Chatterjee, *Nationalist thought and the colonial world* (London, 1986).

<sup>15</sup> P. Chatterjee, 'The resolution of the women's question', in K. Sangari and S. Vaid (eds.), *Recasting women: essays in colonial history* (New Delhi, 1989), pp. 233–253.

<sup>16</sup> *Ibid.*, pp. 250–251.

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbiggin

Excerpt

[More information](#)

## Introduction

7

underpinned all aspects of colonial governance, including the political realm.<sup>17</sup> These studies have shown how British assumptions that holding property was an exclusively male capacity did much to reinforce Indian women's legal subordination, as their place within the family and society at large was reconstituted exclusively in terms of their relationship with men – women were seen to *belong* to a family or community, they were not members in their own right. This marginalisation of women was not the result of patriarchal constructions of religious identity but produced through the legal structure that legitimised and structured colonial state governance as a whole.<sup>18</sup>

Studies of liberalism and its relationship with empire have taken these arguments a step further, demonstrating that these developments reflect the operation of liberal governance in general, not only in South Asia.<sup>19</sup> These works have examined the ways in which the construction of the abstract figure of the universal rights-bearing individual at the heart of liberalism required a corresponding management of the social and bodily differences that structured human relations in everyday life. In other words, the very possibility of human equality rested on processes that compared and contrasted bodies and practices in ways that reinforced a non-equivalent relationship between them.<sup>20</sup> In India, liberal imperialism established that Indians were 'equivalent' enough to Britons to be subject to the 'political' authority of the latter, but their differences from Britons in terms of their 'social' practices made them incapable of exercising this political authority themselves. Thus British political authority in India was constructed in relation to and rested on a particular conception of Indian society as a domain that was connected to the realm of the political by its intrinsic difference from it. Within this framework, the

<sup>17</sup> I. Chatterjee, *Gender, slavery and law in colonial India* (New Delhi, 1999); G. Arunima, *There comes papa: colonialism and the transformation of matriliney in Kerala, Malabar c. 1850–1940* (Hyderabad, 2003); essays in I. Chatterjee (ed.), *Unfamiliar relations: family and history of South Asia* (New Jersey, 2004), pp. 95–121; D. Ghosh, *Sex and the family in colonial India* (Cambridge, 2006); M. Sreenivas, *Wives, widows and concubines: the conjugal family ideal in colonial India* (Bloomington, Ind., 2008), Chapter 1; R. Sturman, *The government of social life in colonial India: liberalism, religious law, and women's rights* (Cambridge, 2012).

<sup>18</sup> M. R. Anderson, 'Work construed', in P. Robb (ed.), *Dalit movements and the meaning of labour in India* (Delhi, 1993), pp. 87–120; J. Nair, *Women and law in colonial India* (New Delhi, 1996); U. Chakravarti, *Rewriting history* (New Delhi, 1998); S. Sen, 'Offences against marriage', in M. E. John and J. Nair (eds.), *A question of silence?* (New Delhi, 1998), pp. 77–110; S. Sen, *Women and labour in late colonial India: the Bengal jute industry* (Cambridge, 1999).

<sup>19</sup> U. S. Mehta, *Liberalism and empire* (Chicago, 1999); M. Goswami, *Producing India* (New Delhi, 2004).

<sup>20</sup> J. Scott, *Gender and the politics of history* (New York, 1989) and J. Scott, *Only paradoxes to offer* (Cambridge, Mass., London, 1996).



Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## 8 Introduction

category of womanhood took on particular salience as a ‘universal’ group in an abstract sense that was, in practice, made up of highly diverse members.<sup>21</sup> As such, ‘womanhood’ became critical in this process of equivalence and exclusion as a marker not only of British and Indian identity but of their difference, as well as of the differences within Indian society, as it was represented to and by the colonial state.

On this basis, Mrinalini Sinha has argued that political devolution in India opened up not simply Indian society’s relationship with the Indian state but also the logic through which Indian social structures were compared with and understood to relate to the terms of political authority. She argues that devolution in the interwar years aligned the space of Hindu ‘community’ with the structures of state power in India, though not in the ways Chatterjee suggests. Whereas Chatterjee seems to suggest a linear trajectory for the unification of religious nation and political state at independence, Sinha stresses the historically contingent and unpredictable way in which these two were brought together, showing how political change in India was itself bound up with global transformations.

She identifies the controversy that surrounded the publication of Katherine Mayo’s *Mother India* in 1927 as a ‘creative event’ which ‘ruptured’ perceptions of India as a collection of religious communities by giving rise to a new political category of Indian womanhood that transcended class, caste and religious division.<sup>22</sup> A strong opponent of devolution in India, and in the colonies under the control of her own, American, government, Mayo argued that Indian, but primarily Hindu, social practices were the cause of Indian backwardness. As such, only Indians could remedy these problems, which lay beyond the purview of the colonial state’s political authority. Until they did so (a process that, on the basis of Mayo’s reading of what constituted Hinduism, seemed to include renouncing adherence to this faith altogether), Indians were not fit to wield political power themselves.<sup>23</sup> Sinha examines male nationalists’ response to Mayo’s claims, showing how their attempts to demonstrate that they were more able and willing to tackle India’s social ills than the colonial state led to widespread support for Rai Harbilis Sarda’s Child Marriage Restraint Bill, passed in 1929, which established marriage below the age of fourteen for girls and eighteen for boys as a criminal offence, regardless of the couple’s religious customs or laws.

<sup>21</sup> Rachel Sturman offers an excellent discussion of this point in the introduction of her *The government of social life in colonial India: liberalism, religious law and women’s rights* (Cambridge, 2012).

<sup>22</sup> M. Sinha, *Specters of Mother India* (Durham, N.C., 2006), especially pp. 5–12.

<sup>23</sup> K. Mayo, *Selections from Mother India*, Mrinalini Sinha (ed.) (Delhi, 1998).



Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbiggin

Excerpt

[More information](#)

## Introduction

9

Indian women mobilised around the Bill to carve out and realise a new constituency in Indian politics, that of 'women' freed from all religious markers. But such a category was not sustainable for long. As Sinha shows, in the discussions about political reform that followed the Sarda Act, the (Hindu) majority of members of women's organisations opted to support Congress's calls for a joint electorate, without communal representation, on the grounds that this would shore up the new women's constituency, as one that operated free from religious distinctions. Such a position did much to alienate lower-caste Indians and Muslims, who feared such an electorate would lead to Hindu political majoritarianism. The subsequent debates served to equate the liberal language of women's rights with Hindu-dominated nationalism while Indian Muslims came to be defined as a community that wished to subsume women's autonomy to religious, group identity. Sinha traces the ways in which a colonial liberalism, grounded in a language of universal rights focused on the white man, gave way to a form of Hindu-centric liberalism, a language of universal rights focused on the upper-caste, elite Hindu man.

This book builds on but seeks to offer a broader context for Sinha's arguments about the interwar period. It argues that while the events surrounding the publication of *Mother India* gave rise to a new language of rights, the emergence of a Hindu-centric liberal subject in this period was the result of profound, and by no means inevitable, shifts in the political, but even more importantly the economic, structures of Indian state power. Beginning in 1916 and running through to the 1950s, it shows how the financial policies that underpinned the expansion of government and political representation in this period served to open up questions about the structure of Hindu law in ways that drew upper-caste, north Indian Hindu men into closer relationship with state power. In so doing it confirms what Ritu Birla and Rachel Sturman have demonstrated in their recent and important works, that the task of economic management was profoundly bound up with the governance of Indian society and the structures of personal law.

Looking at the development of colonial commercial and contract law between 1870 and 1930, Birla shows how the Hindu family firm came to be constructed as both equivalent and inferior to European-owned firms that were seen to operate in closer conjunction with the abstract image of 'liberal economic man', an individual who operated within mechanisms of exchange framed in the 'universal' language of contract rather than local customs or 'culture'.<sup>24</sup> The object of state scrutiny and criticism under

<sup>24</sup> R. Birla, *Stages of capital: law, culture and market governance in late colonial India* (Durham and London, 2009).

Cambridge University Press

978-1-107-03783-0 - The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community

Eleanor Newbigin

Excerpt

[More information](#)

## 10 Introduction

British rule, the Hindu family firm went on to become the basis of a specifically Indian model of modern economy, which was culturally distinct from its colonial, ‘universal’ counterpart even as it operated within the same legal–economic framework.

Sturman’s detailed and comprehensive study of the development and transformation of Hindu law between the 1810s and the 1940s observes similar transformations argument even further.<sup>25</sup> Looking at the impact of contemporary liberal political economic theory on Indian case law, she shows how colonial legal intervention reconstructed Hindu law as antithetical to, but therefore comparable with, the structures and ends of liberalism; Hindu law was reconfigured in relation to the intellectual terrain of liberal ideology, as a structure that was marked by its *illiberal* practices, in particular those relating to property rights and women’s status. Just as the spaces of socio-religious and state power should not be seen as two distinct domains, colonial Hindu law was constituted by and through the political and economic legal structures that undergirded liberal state power.

### **Hindu law and the political economy of democratic governance**

This book argues that the Hindu Code Bill was an attempt to consolidate and embed a new model of Hindu law that operated in consonance with the political economy of representative government that emerged in India in the first half of the twentieth century. This reflects a divergence from the conventional historical periodisation of late colonial South Asian history.<sup>26</sup> Both Sturman and Birla highlight the late nineteenth century as a time of real shift in terms of the administration’s attempts to systemise and rationalise both its own institutions and its view of the society it governed.<sup>27</sup> Their studies continue into the early twentieth century and interwar years without fully considering the ways in which devolution of political authority affected not simply the composition of the Indian state but also the structures through which it interacted with Indian society, beyond the courts and legislatures. At the same time, as is standard practice among historians of South Asia, these studies stop before the watershed of independence in 1947, making only brief comments about the implication of their work for the postcolonial state in

<sup>25</sup> R. Sturman, *The government of social life in colonial India*.

<sup>26</sup> This book is not, however, unique in doing so. Shabnum Tejani’s study of secularism and communalism in late colonial India follows a similar chronological framework – see S. Tejani, *Indian secularism*.

<sup>27</sup> *Ibid.*, p. 17; Birla, *Stages of capital*, pp. 4–5.